Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1367

In The

Supreme Court of the United States

OCTOBER TERM, 1986

ADAM *et al*,

Petitioners,

vs.

BROTHERHOOD RAILWAY CARMEN *et al*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT CONSOLIDATED RAIL CORPORATION

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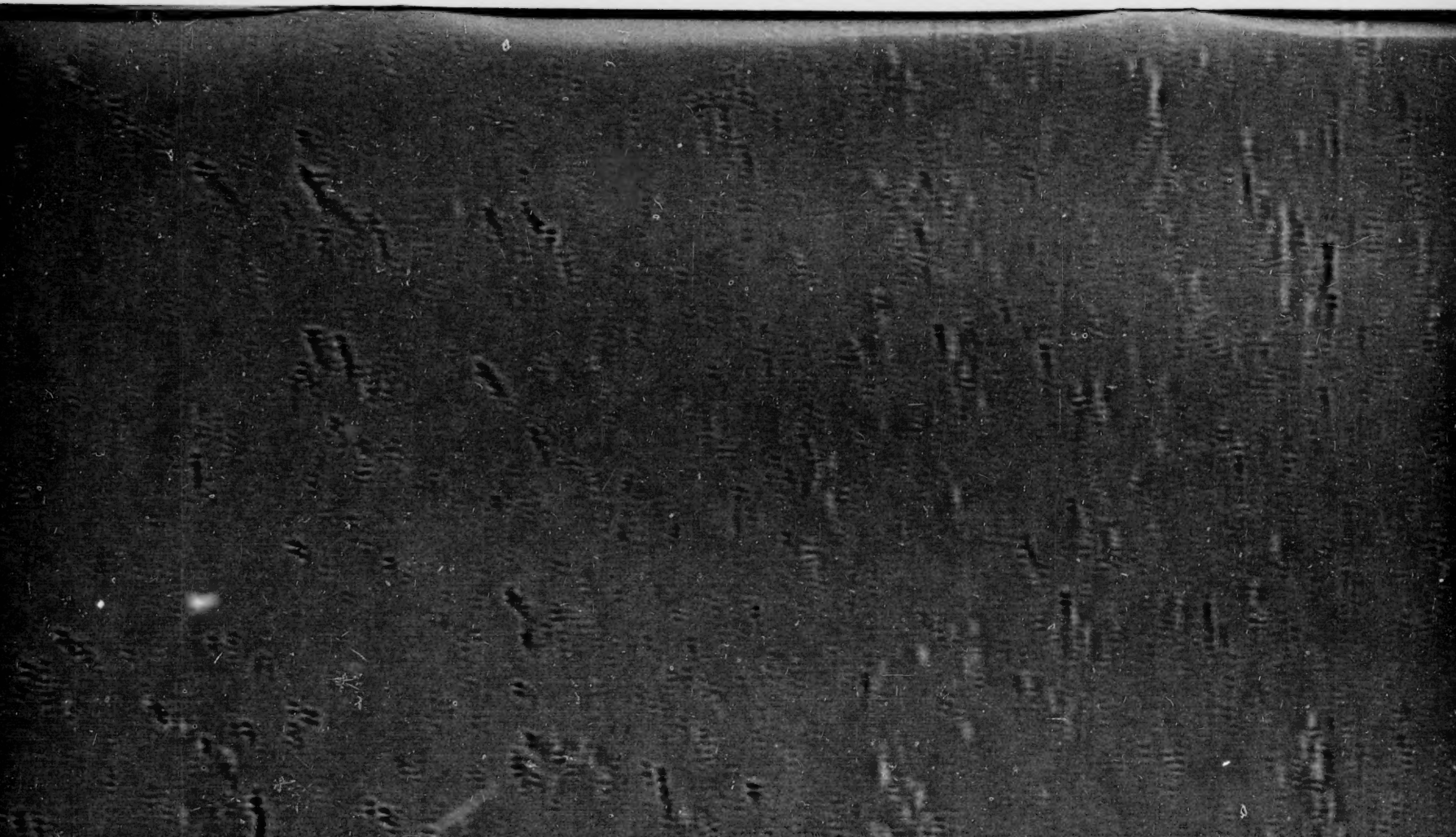

QUESTIONS PRESENTED

1. Whether there exists a genuine issue as to any material fact concerning the alleged breach of the duty of fair representation by Respondent Brotherhood Railway Carmen.

2. Whether there exists a genuine issue as to any material fact concerning the alleged conspiracy among Respondents to close former Erie-Lackawanna Railroad Yards in the Buffalo area in order to cause the furlough of Petitioners.

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No. 86-1367

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Respondents.

RULE 28.1 LIST

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent Consolidated Rail Corporation ("Conrail") herein discloses the following subsidiaries (except wholly-owned subsidiaries) and affiliates, with the percentage of stock interest held noted in parentheses: The Akron & Barberton Belt Railway Company (50%); Albany Port Railway Corporation (50%); American Casualty Excess Insurance Company, Limited (less than 3%); The Belt Railway Company of Chicago (15.38%); Calumet Western Railway Company (25%; 50% of this company is owned by Indiana Harbor Belt Railroad Company, a subsidiary of Conrail); Chicago & Western Indiana Railway Company (20%); Indiana Harbor Belt Railroad Company (51%); The Lakefront Dock and Railroad Terminal Company (50%); The Monongahela Railway Company (33.33%); Nicholas, Fayette &

Greenbrier Railroad Company (50%); Peoria & Pekin Union Railway Company (25.64%); Pittsburgh Chartiers & Youghiogheny Railway Company (50%); Railroad Association Insurance, Limited (9.09%); Trailer Train Company (4.88%).

OPINIONS BELOW

The opinions of the court of appeals and the district court are unreported. The initial opinion of the district court, which also is unreported and not contained in Petitioners' Appendix, is reproduced as Respondents' Appendix (hereafter "RA").

JURISDICTIONAL STATEMENT

Petitioners claim federal jurisdiction arising out of Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185), a jurisdictional basis that is inconsistent with *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376-77, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). Jurisdiction does exist, however, under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*

STATEMENT OF THE CASE

This is a duty of fair representation case brought by 44 individuals employed as carmen[1] by Conrail. They belatedly challenge the collective bargaining agreement establishing the seniority system for over 4000 carmen employed by Conrail. They also posit a phantom conspiracy that supposedly denied them their seniority rights. The courts below rejected their claims, holding that they were unsupported by any evidence.

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[1] Carmen work in the Maintenance of Equipment Department of Conrail and are responsible for inspecting, maintaining and repairing railroad rolling stock.

Petitioners once worked on the Erie-Lackawanna Railroad ("EL"), which formed into Conrail in 1976, along with the Penn Central Railroad ("Penn Central") and four other bankrupt railroads. Congress created Conrail pursuant to the Regional Rail Reorganization Act of 1973 (the "3R Act").[2] Petitioners, who were laid off after Conrail closed certain Buffalo, New York area railroad yards, allege that a 1975 collective bargaining agreement is unfair and should have been renegotiated to establish a seniority system that would have preserved their jobs while eliminating those of other carmen.

Respondents are Conrail and two unions. Brotherhood Railway Carmen of the United States and Canada ("BRC") represents Petitioners.[3] Transport Workers Union of America ("TWU") represents carmen formerly employed by Penn Central.

The focal point of this controversy is a collective bargaining agreement negotiated by BRC, TWU and Conrail in 1975. That agreement formed the structure for consolidating the employment rights of persons formerly employed by six independent railroads. In mid-1975, Conrail entered into a "Single Implementing Agreement" with the unions (including Respondent un-

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[2] 45 U.S.C. §§ 701-794, P.L. 93-236, 87 Stat. 986 (1974). Conrail was created by Congress in reaction to the railroad crisis caused by the bankruptcy of several major railroads in the late 1960's and early 1970's. The 3R Act created Conrail as a "common carrier by railroad," 45 U.S.C. § 741(b), subject to the provisions of the Railway Labor Act. 45 U.S.C. § 772(a). The 3R Act was Congress' "innovative program designed to replace the inefficient, costly, often duplicative insolvent lines with a new and economically viable rail system. The [3R] Act created Conrail, a private, for-profit corporation, to acquire substantial portions of the insolvents' railroad properties." *Hinds v. Consolidated Rail Corp.*, 518 F. Supp. 1350, 1354 (Sp. Ct. R.R.R.A. 1981), *cert. denied*, 454 U.S. 1145 (1982). *See also* H. Perritt, Jr., *"Ask and Ye Shall Receive, the Legislative Response to the Northeast Rail Crisis,"* 28 Vill. L. Rev. 271 (1982-83).

[3] BRC is now a division of the Brotherhood of Railway and Airline Clerks.

ions) representing the employees of the six bankrupt railroads, as then required by Section 504(b) of the 3R Act, 45 U.S.C. § 774(b). This general agreement provided a framework for determining the seniority of employees in their respective crafts, effective upon conveyance. Consistent with the statutory requirement, it specifically provided that "prior seniority rights will be maintained within the new districts with appropriate symbol designations on the new rosters."

Also in 1975, BRC and TWU negotiated a separate collective bargaining agreement with Conrail which, among other things, established a system for determining seniority rights of all carmen (the "Seniority Agreement"). The parties were required to do this under the 3R Act, which set forth extensive employment and labor relations requirements for Conrail.[4] The Seniority Agreement created new Conrail Seniority Districts and provided for a roster listing all employees by their seniority date with their previous railroad.

The Seniority Agreement also provided for establishment of the "prior rights" seniority system. Under the "prior rights" system, which is common in railroad mergers, employees who worked at their former railroad's facilities prior to merger could not be displaced at those facilities by employees who formerly worked on another railroad. Thus, as applied to Conrail, each of the Petitioners enjoyed greater seniority at their EL facility than carmen from the other railroads that formed Conrail. This gave Petitioners priority to any jobs at their former EL facility. At the

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[4] Under the 3R Act, Conrail was required to offer employment to nearly all employees of railroads in reorganization. 45 U.S.C. § 772(b). Section 504 of the 3R Act, 45 U.S.C. § 774, contained several requirements concerning collective bargaining agreements covering: (a) application of prior agreements; (b) negotiation of implementing agreements for the transfer of employees to Conrail; and (c) the negotiation of new collective bargaining agreements following conveyance of rail properties to Conrail covering all employees in a craft or class.

same time, for example, Petitioners' job rights were subordinate to all former Penn Central employees, no matter how junior, at former Penn Central facilities.

Pursuing its mandate to create an economically viable rail system, Conrail immediately after its formation began to streamline rail operations in the Buffalo area. To do so, it closed the superfluous and duplicative facilities formerly used by several independent railroads. Several former EL facilities were closed immediately; many of them were too small, too antiquated and too inefficient for use in the revamped system. Conrail shut down other EL facilities as a result of the severe economic depression that hit Buffalo beginning in the late 1970's; the industries they once served no longer existed. Virtually all Petitioners were laid off as a result of these closures. Even though Conrail continued to operate some facilities in Buffalo, they were former properties of its other component railroads, where other employees had prior rights superior to Petitioners.

Prior to August, 1981, this effect of the "prior rights" system apparently did not concern Petitioners, because Title V of the 3R Act established a lifetime wage benefit for workers laid off by Conrail.[5] In 1981, however, Congress enacted the Northeast Rail Service Act ("NRSA"), which eliminated the Title V program

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[5] Section 505 of the 3R Act, 45 U.S.C. § 775, created a system of employee protections, including a federally-funded income maintenance program. These employee protections (commonly called "Title V Protections") had as their central feature cash payments to all protected employees (those with five or more years of service on January 1, 1974) who were deprived of employment or their normal earnings, until they had reached the age of 65. *See Hinds v. Consolidated Rail Corp.*, 518 F. Supp. 1350, 1353-1355 (Sp. Ct. R.R.R.A. 1981), *cert. denied*, 454 U.S. 1145 (1982).

and replaced it with greatly reduced benefits.[6] In 1983, nearly two years after the enactment of the NRSA, and long after Conrail had closed operations at most of the facilities where Petitioners had been employed, they commenced suit in the United States District Court for the Western District of New York, contending that the prior rights system was unfair and should have been renegotiated. In particular, Petitioners alleged that Respondent unions had breached their duty of fair representation to Petitioners by failing to eliminate prior rights and renegotiate the Seniority Agreement to provide for a "dove-tailed" seniority system (generally ranking employees by their date of hire).[7] Petitioners further alleged that since 1976, Respondents had conspired to close all the former EL railroad yards in the Buffalo area, thereby causing Petitioners to lose their jobs.

In an order dated March 4, 1985, in response to Respondents' initial motions to dismiss and for summary judgment, the district court dismissed portions of Petitioner's complaint concerning negotiation of the Seniority Agreement in 1975, finding that the claim was barred by the Statute of Limitations (RA 7). This dismissal was not appealed. The district court also concluded that whether the collective bargaining agreement violated the 3R Act or NRSA was beyond its jurisdiction (RA 10). Petitioners never appealed this ruling either.

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[6] 45 U.S.C. §§ 1101-1116, P.L. 97-35, 95 Stat. 643 (1974). In enacting the NRSA, Congress concluded that Title V "resulted in the payment of benefits far in excess of levels anticipated," and was an obstacle to achievement of improved rail service and employment for the northeast region of the United States. 45 U.S.C. § 1101(4). Title V was repealed and replaced with a new limited labor protection program, effective September 1, 1981. Act of August 13, 1981, P.L. 97-35, Title XI, Subtitle E, Part 3, § 1144(a)(1), 95 Stat. 669; 45 U.S.C. § 797, *et seq.*

[7] Respondent Conrail has always favored the "dove-tailed" approach over the "prior rights" system. However, the selection of seniority system must be negotiated with union representatives, not individual employees. 45 U.S.C. §§ 152, 774. In this case, the majority of carmen voted in favor of the "prior rights" system.

The district court characterized Petitioners' remaining claim as alleging that Respondents breached the duty of fair representation by failing to seek dove-tailed seniority after 1981 and conspiring to prevent that result (RA 11). Although the district court initially denied Respondents' motions for summary judgment on this issue, it observed that Petitioners' evidence was not sufficient to establish that any of the Respondents had acted improperly (RA 12). The district court noted that "[n]ormally this state of affairs would compel granting of defendants' motions for summary judgment." *Id.* However, it gave Petitioners an opportunity to produce additional evidence after further discovery. The court admonished, however, that "[t]he plaintiffs will need to show considerably more than they have shown thus far in order to survive a renewed motion for summary judgment." (RA 13).

Following complete discovery, the district court granted Respondents' renewed motions for summary judgment. In an order dated July 9, 1986, the district court ruled as follows:

> . . .I believe that all of the defendants in this case are entitled to summary judgment at this time. The Court has reviewed all the affidavits and depositions filed in support of the motion for summary judgment and has considered plaintiffs' arguments. Under the circumstances, the BRC was under no obligation to attempt to renegotiate the prior rights agreement. Certainly, the TWU owed no obligations to the plaintiffs in this case.
>
> From a review of all the materials, it appears without question that the decision to close the yards was made by Conrail management, and *there is no evidence whatsoever of a conspiracy by the defendants in this case directed at the plaintiffs.*
>
> The motion for summary judgment in behalf of all defendants is granted, and the complaint is dismissed.

(14a-15a[8]) (emphasis supplied).

Thereafter, Petitioners appealed to the court of appeals. In an opinion dated November 21, 1986, the court of appeals affirmed the judgment of the district court in all respects. Viewing the facts in the light most favorable to Petitioners, the court of appeals agreed that Respondents were entitled to summary judgment on all issues. It reasoned that BRC had no duty to renegotiate the Seniority Agreement after the enactment of the NRSA "because the negotiation of the prior rights clause had nothing to do with the wage protections then contained in Title V." (3a). It further reasoned that "it is clear from the record that the decision to close the EL facilities was made solely by Conrail based on economic considerations." *Id.* Accordingly, it held that Petitioners' conspiracy claim lacked merit. *Id.*

REASONS FOR NOT GRANTING THE PETITION

A. *This Case Does Not Raise Important Questions of Federal Law.*

Although the Petitioners state that this case presents "an important question of Federal Law which has not been but should be resolved by this court," the Petition is wholly devoid of any support for that assertion and does not state any other compelling reasons for this Court to exercise its review powers.

Petitioners merely ask this Court to consider again "whether the Transport Workers Union of America and Consolidated Rail, Inc. conspired together with the Brotherhood Railway Carmen of America and Canada to promote the closure of former Erie Lackawanna Railroad Yards. . . ." (Petition, at i). The form of the question presented asks this Court to parse the record and

[8] References are to Petitioners' Appendix accompanying the Petition for Certiorari.

make its own determination as to whether a conspiracy exists. The district court found "no evidence whatsoever of a conspiracy." (15a). The court of appeals similarly determined that Conrail made the decision to close the EL facilities solely based on economic considerations, and that Petitioners' conspiracy claim lacked merit. Insofar as Petitioners seek to have this Court reexamine the underlying facts to determine whether a conspiracy existed, the question presented by Petitioners is not a proper one for review. *See United States v. Johnston,* 268 U.S. 220, 227 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Texas v. Mead,* 465 U.S. 1041, 104 S.Ct. 1318, 79 L.Ed.2d 714 (1984) (Stevens, J. concurring).

The sole question presented by the Petition is a simple procedural one: whether the lower courts properly granted summary judgment where Petitioners failed to marshall any evidence supporting their claims. This question is not new and this case does not present novel or important issues that warrant review by this Court. Nor have Petitioners attempted to demonstrate that the court of appeals' decision represents a departure from the accepted and usual course of judicial proceedings.

Finally, the resolution of the underlying controversy in this case would not have far-reaching impact on the public. This case basically involves nothing more than a disagreement between a discrete group of employees and union representatives over policy. Review by this Court would only impact the litigants in this case. *See Rice v. Souix City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1954); *Magnum Import Co. v. Houbigant, Inc.,* 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922 (1922).

In essence, the Petition is a pale attempt by Petitioners to seek rehearing of their case. While Petitioners may disagree with the results below and may wish to have another opportunity to prove their case, neither of these reasons constitutes a proper ground for review. As this Court said in *Magnum Import Co.,* the pur-

pose of certiorari is "to bring up cases involving questions of importance which it is in the public interest to have decided. . ." and not "merely to give the defeated party in the circuit court of appeals another hearing." 262 U.S. at 163.

B. *The Decision of the Court Below Correctly Applied the Governing Law and Does Not Conflict With the Decisions of This Court or Other Courts of Appeal.*

Petitioners offer little argument or authority in challenging the decision below, except conclusory statements that summary judgment should not have been granted. The court of appeals' decision, however, correctly applied the rules governing summary judgment and the substantive law.

1. *The Court Below Correctly Applied Summary Judgment Standards.*

According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate (1) where all the factual matters set forth by the parties in their pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, show there is no *genuine* issue as to any *material* fact; and (2) where, applying the substantive law to the facts, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In such circumstances, where the party seeking summary judgment can point out the absence of evidence supporting the non-moving party's case, the non-moving party has the burden of designating specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S.____, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). As this Court explained in *Celotex Corp.*:

> "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to

> that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

106 S.Ct. at 2552-53, 91 L.Ed.2d at 273.

In this case, Petitioners had ample opportunity for discovery. In its initial ruling, the district court expressly warned Petitioners as to the lack of evidence they had marshalled in support of their claims (RA 13). Although it allowed Petitioners to undertake further discovery and prove their case, even after further discovery Petitioners failed to present any evidence raising a triable issue.

The court of appeals similarly viewed the facts in the light most favorable to Petitioners and concluded that Respondents were entitled to summary judgment. This is entirely consistent with the decisions of this Court on the standards for summary judgment. *See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio,* 475 U.S.____, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 933, 8 L.Ed.2d 176, 177 (1962)).

Notwithstanding Petitioners' failure, after a second opportunity for discovery, to produce evidence supporting their claim, they now contend that "substantial evidence will and can only be shown by allowing a complete and equitable litigation of this matter before a jury." (Petition, at 6). However, a party opposing a motion for summary judgment must do more than make allegations. Rule 56(e) clearly requires that a party opposing a summary judgment motion set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

On several occasions, this Court has ruled that mere allegations of factual disputes are insufficient to withstand a motion

for summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Matsushita Electric Industrial Co., Ltd.*, 475 U.S. 106 S.Ct. 1348, 89 L.Ed.2d 538, 551-52 (1986). In *Cities Service Co.*, this Court held that a plaintiff could not rest on his allegations of a conspiracy to get to a jury "without any significant probative evidence tending to support the complaint." 391 U.S. at 290. Petitioners face the same barrier here and cannot surmount it.

2. *The Court Below Properly Applied the Substantive Law.*

The court below also correctly applied the substantive law. To establish that Respondent unions breached their duty of fair representation, Petitioners were required to show that they "acted arbitrarily, discriminatorily, or in bad faith" or that their decisions were based on "discriminatory animus." *Price v. International Union, United Automobile Aerospace and Agricultural Workers*, 795 F.2d 1128, 1135-36 (2d Cir. 1986). Petitioners never presented any evidence to meet this standard. It is well-established that a disagreement between union decision makers and portions of its membership does not constitute a breach of the duty of fair representation. As this Court held in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048, 1058 (1953), individuals challenging union decisions must overcome a presumption of reasonableness:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Moreover, the Railway Labor Act firmly establishes that Respondent Conrail could negotiate the seniority system only with Petitioners' union representatives. *Virginia Railway Co. v. System Federation No. 40,* 300 U.S. 515, 568, 57 S.Ct. 592, 81 L.Ed. 789, 799, 800, (1937). Any claims by Petitioners that Conrail somehow breached a duty to Petitioners are thus unfounded.

3. *No Conflict Exists.*

The decision of the court of appeals is not in conflict with the decisions of other federal courts on either question presented by this case. The only authority cited by Petitioners in challenging the propriety of summary judgment is *Bohn Aluminum & Brass Corp. v. Storm King Corp.,* 303 F.2d 425 (6th Cir. 1962). Petitioners contend that the district court did not meet the *Bohn* standard by failing to construe "evidence regarding the interrelationship of Title V and the seniority agreement" in the most favorable light for Petitioners. The issue presented by the Petitioners in this case, however, is whether the court of appeals applied the correct standard in affirming the grant of summary judgment. Relying on *Falls Riverway Realty, Inc. v. City of Niagara Falls,* 754 F.2d 49, 54 (2d Cir. 1985), the court of appeals did view all of the facts in the light most favorable to Petitioner. (3a). The standard applied by the court of appeals is the same as that articulated in *Bohn* and comports with several decisions of this Court on this issue.

With respect to the substantive law, the decision below is entirely consistent with the many other federal decisions concerning seniority disputes in railroad mergers. Only one other federal case has dealt squarely with the narrow question of whether the Respondent unions had a duty to renegotiate prior rights seniority in light of the amendments to Title V. In that case the United States District Court for the Northern District of Ohio granted summary judgment and dismissed the plaintiffs' claims. On ap-

peal, the Sixth Circuit Court of Appeals affirmed the district court's decision, ruling that the plaintiffs' claims were barred by the applicable statute of limitations. *Loew v. Consolidated Rail Corporation,* No. 85-3969, slip op. at 4-6 (6th Cir. January 15, 1987) (per curiam)[9]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 20, 1987

Respectfully submitted,

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[9] (available on LEXIS, Genfed Library, U.S. App. File)

RESPONDENTS' APPENDIX

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United States District Court
Western District of New York

A. ADAM, *et al.*,

Plaintiffs,

vs. CIV-83-582C

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, TRANSPORT UNION OF AMERICA, and CONSOLIDATED RAIL, INC.,

Defendants.

APPEARANCES: THIELMAN & JASEN (PHILLIP A. THIELMAN, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

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O'DONNELL & SCHWARTZ (MALCOLM A. GOLDSTEIN, ESQ., of Counsel), New York, New York, for Defendant Transport Workers Union of America.

NIXON, HARGRAVE, DEVANS & DOYLE (ROBB M. JONES, ESQ., of Counsel), Rochester, New York, for Defendant Consolidated Rail, Inc.

I.

This is an action arising under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*[1] The plaintiffs are 44 individuals who were employed as carmen by the Erie Lackawanna Railroad [EL]. The EL was merged into Consolidated Rail Corporation [Conrail] in 1976. The plaintiffs were represented by defendant union Brotherhood Railway Carmen [BRC]. The other union defendant is Transport Workers Union of America [TWU], which represents workers formerly employed by the Penn Central Railroad [Penn Central]. Penn Central was also merged into Conrail in 1976.

The plaintiffs allege that, in 1975, BRC negotiated a disadvantageous agreement with Conrail and TWU. This agreement became especially detrimental when, in 1981, Congress enacted legislation which repealed statutes which had prevented the 1975 agreement from having significant, financially harmful impact. Although the complaint is unclear, the plaintiffs apparently allege that the negotiation of the 1975 agreement and the failure to endeavor to amend it after 1981 constitute breaches of BRC's duty of fair representation.

The plaintiffs also allege that BRC, TWU, and Conrail conspired to close all of the railroad yards to which the plaintiffs had been assigned. Each of the defendants has filed a motion for summary judgment.

All defendants claim that the instant lawsuit is barred by the six-month statute of limitations applicable to lawsuits of this character pursuant to the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters,* ____U.S.____, 103 S.Ct. 2281 (1983), and the Second Circuit's decision in *Welyczko v. U.S. Air, Inc.,* 733 F.2d 239 (2d Cir. 1984) (holding that the six-month period applies to cases arising under the Railway Labor Act). The defendants also claim that their motions can be

granted because the plaintiffs have failed to adduce evidence sufficient to support an inference that there was a conspiracy among them to close the facilities where the plaintiffs worked. Finally, Conrail claims that this court lacks subject matter jurisdiction over the issues raised in this action.

II. Facts

Briefly stated, the facts are as follows. In December of 1975, the defendants concluded an agreement which established the seniority rights of railroad workers, including those working for Penn Central and EL facilities. The amendments to this agreement were finalized in 1976. *See* Item 18, Ex. D. Such an agreement was necessitated by the impending merger of the Penn Central, the EL, and several other financially troubled railroads into the Consolidated Rail Corporation.

The statutory network governing the establishment and operations of Conrail required Conrail to negotiate an agreement such as that negotiated with BRC and TWU. Regional Rail Reorganization Act [3R Act] §504 (45 U.S.C. §774). Specifically, the statue said that "prior seniority rights" were to be preserved to the extent possible.

"Prior rights" is a concept well known in the railroad industry. It means that a worker hired by one railroad company after a second worker was hired by another company has, after a merger of the two companies, greater seniority on facilities formerly operated by his old company. Thus, a former Penn Central worker with 20 years seniority would have greater seniority on facilities formerly operated by Penn Central than a former EL employee with 30 years seniority. *United Transportation Union v. S.E.P.T.A.*, 555 F. Supp. 1382, 1385 (Special Court, Regional Rail Reorganization Act 1983).

In the present case, the plaintiffs had prior rights on EL facilities, but eventually, all EL facilities were closed while those of Penn Central were maintained. The result was that former EL workers with more seniority were unable to displace less senior former Penn Central workers at the yards Conrail chose to keep in operation.

The impact of prior rights agreements was less severe before August 1981 because Title V of the 3R Act established a lifetime wage benefit for workers laid off by Conrail. Title V was repealed effective August 13, 1981, when Congress enacted the Northeast Rail Service Act [NRSA], Pub.L. No. 97-35, 95 Stat. 644-687 (1981), 45 U.S.C. §1101, *et seq.* Congress specifically found that the fiscal burden imposed by the wage benefit was "excessive." 45 U.S.C. §1101(4). Consequently, NRSA limited furloughed rail workers' benefits, plus $42.00 a day, up to a maximum lifetime limit of $20,000.00.

The combination of the 1975 prior rights agreement, the closing of former EL facilities, and the enactment of NRSA resulted in the furlough of these plaintiffs. They contend that their union failed to seek an end to prior rights when NRSA and the EL shutdowns brought financial hardship upon them. They accuse Conrail, TWU, and BRC of conspiring to bring about these results. Hence, this lawsuit.

III. Statute of Limitations

It is now clear that the applicable period during which this action could have been timely commenced is the six-month period following the time when the claims accrued. *DelCostello, supra; Welyczko, supra.* The questions to be addressed here are: 1) What is the nature of the plaintiffs' claims? and 2) When did the

claims accrue? The court has identified two possible claims which the plaintiffs may have attempted to assert here. One is clearly time-barred.

A. *The Execution of the 1975 Agreement on Prior Rights*

As previously noted, section 504(b) of the 3R Act required Conrail and the relevant unions to negotiate a single implementing agreement which was to provide a procedure for determining the seniority of employees. Section 504(b) required that such procedures "preserve [employees'] prior seniority rights." The procedure for determining seniority was worked out among the defendants in December of 1975. Subsequent modifications occurred in April and May of 1976. This is the seniority-determining procedure which the plaintiffs attack here.

One view of the present lawsuit is that BRC breached its duty of fair representation by acceding to an agreement which was detrimental to the plaintiffs.[2] If this is the claim, then it accrued on the date that the agreement was executed or, at the latest, at the time when the plaintiffs became aware, or should have become aware, of its provisions. This is consistent with the principle that a claim for breach of the duty of fair representation accrues when "plaintiffs knew or reasonably should have known that such a breach had occurred." *Santos v. District Council of New York City,* 619 F.2d 963, 969 (2d Cir. 1980).

The plaintiffs state that the 1975 prior rights agreement was reached without their knowledge or consent. They also state that they had no knowledge of it until more than five years later, when they were laid off at Bison Yard, a former EL facility.

The defendants have stated that a Conrail consolidated seniority roster was posted in April of 1977. This roster contained the names of the plaintiffs in this lawsuit, the seniority order of all carmen, the carmen who had prior rights, and the locations

where they had such rights. Furthermore, after the prior rights agreement attained its final form, published copies of it were distributed to all carmen by November 1977. Affidavit of George F. Brent, Item 18, ¶¶12-13.

The plaintiffs do not controvert these statements in their responding affidavit. Rather, they say only that they were unaware of the provisions they attack here. Horsley Affidavit, Item 23, ¶¶7-8. Thus, the record contains uncontroverted facts which demonstrate that, by late 1977, the plaintiffs reasonably should have known that BRC breached its duty of fair representation. This lawsuit was not commenced until May 1983, which is well beyond the six-month period applicable here. Therefore, any claim based upon BRC's negotiation of the prior rights agreement is barred by the statute of limitations.

Accordingly, the instant complaint is dismissed insofar as it charges these defendants with wrongdoing in connection with the negotiation of the prior rights agreement.

B. *Failure to Attempt to Renegotiate the Prior Rights Agreement After August 31, 1981*

As noted above, Title V of the 3R Act was repealed by legislation effective August 13, 1981. The repeal of Title V put an end to employee protection payments made to unemployed rail workers. Thus, persons put out of work by the operation of prior rights now faced the increased hardship of financial privation. Abolishing prior rights would have improved the plaintiffs' chances of continued employment. So, they wanted their union to work on their behalf to secure the abolition of prior rights. They claim that their union, the BRC, failed to seek this benefit. Plaintiffs also allege that TWU and Conrail conspired to prevent this benefit from being attained.

The question is: When did this claim accrue? The answer depends upon when the plaintiffs knew or should have known that their union had failed to seek the change they desired.

Conrail suggests that the 1A test date upon which this claim could have accrued is July 29, 1982. This date is selected because that is when a "pilot grievance" challenging the application of the prior rights agreement was withdrawn by the defendants. Brent Affidavit at ¶15.

The court cannot accept this view. The grievance referred to by Conrail was filed in September 1981 by Arthur H. Post, who is a plaintiff in this case. Mr. Post's grievance stated that "Younger unprotected men working while I am furloughed — I am a protected man and older on the roster." Post Grievance, Item 18, Ex. F. This statement and the "position" taken by the employees (*see* Ex. F) clearly indicated that the grievance was based on the misconception that the assignment of workers was *contrary* to applicable bargaining agreements. This is not the theory of the claims asserted in this court. Here, the contention is that BRC did nothing to *amend* an agreement which had become detrimental to the plaintiffs' interests.

Nor can the court accept the argument that the claim accrued in 1977, when plaintiffs became chargeable with knowledge of the prior rights agreement. The court has already determined that any quarrel the plaintiffs have with the *creation* of the prior rights agreement is a stale claim whose time has long passed. However, the complaint can also be read as charging defendants with wrongfully preventing the abolition of prior rights when a change in the law made prior rights especially onerous.

This alleged failure to attempt to change a previous agreement in light of intervening events can be identified as wrongful conduct without reference to the execution of the prior rights agree-

ment in 1975. The duty to change the agreement arose in August of 1981. It is by reference to that date that the defendants' conduct is to be examined. Failure to seek a change in the prior rights agreement is, therefore, a separate charge unrelated to the establishment of prior rights in 1975.

Thus, defendants' reliance upon cases such as *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, ____U.S.____, 104 S.Ct. 976 (1984), is unavailing. *Metz* involved a discharged worker whose union failed to initiate grievance procedures in a timely fashion. This was union inactivity identifiable as wrongful conduct only by reference to conduct which had occurred well outside the limitations period. The court held that the action was untimely, because Ms. Metz should have made an earlier discovery of her union's inactivity. 715 F.2d at 304.

In the present case, the plaintiffs maintained continuous correspondence with BRC personnel since February 7, 1982. Horsley Affidavit, Item 23, Ex. A. This is less than six months after the effective date (August 13, 1981) of the legislation which repealed the portions of the 3R Act which had benefited the plaintiffs. Thus, the plaintiffs are not guilty of indefinitely "sitting on their rights" and controlling the time when the limitations clock began to tick. They began the process of imploring their union to seek a change in prior rights less than six months after the date upon which the change became desirable.[3]

Once plaintiffs began this process, they persisted in it. The complaint in this case was filed on May 31, 1983. The court cannot say that, within six months of commencing this suit (*i.e.*, by November 30, 1982), it should have been obvious to the plaintiffs that their union had breached its duty to seek the abolition of prior rights. The plaintiffs had corresponded with Robert L. Shoemaker, BRC's General Chairman, since early February 1982. On November 2, 1982, they asked that he request a formal meeting with TWU "to negotiate on the removal of Prior Rights

and secure a dovetailed seniority roster for our members." Horsley Affidavit, Ex. J. On December 15, 1982, the plaintiffs wrote a letter to the BRC Executive Board requesting action in view of Mr. Shoemaker's denial of the request made of him in the November 2 letter. *Id.*, ¶33 and Ex. M.

The pattern of the plaintiffs' correspondence with BRC indicates that they properly worked through union channels to obtain action on their request. Their complaint here is that the union handled their requests in bad faith, thereby breaching its duty of fair representation. Assuming, as we must at this stage, that BRC did not act on the requests in good faith, the union was continually breaching its duty toward the plaintiffs. This is not a case wherein union activity was innocent except as it related to prior conduct as to which all claims are time-barred. Compare *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 305-06. Rather, this is a case where each post-August 1981 action taken by BRC was, arguably, part of a pattern of failing to press a request made by its members.

For the foregoing reasons, the complaint is not time-barred to the extent that it alleges that BRC refused to seek the abolition of prior rights. Also, for the reasons which follow (*see* pp. 15-18, *infra*), the complaint's allegations of a conspiracy among BRC, TWU, and Conrail will not be dismissed at this state of the litigation.

IV. Jurisdiction

Conrail contends that this court lacks subject matter jurisdiction over the claims asserted here because the claims against it are based upon Conrail's decision to close certain railroad yards. Conrail argues that claims of this nature are under the exclusive jurisdiction of the Special Court created by section 209 of the 3R

Act of 1973 (45 U.S.C. §719).[4] Reference is made to section 1152(a)(1) of NRSA (45 U.S.C. §1105(a)(1)), which provides as follows:

> Notwithstanding any other provision of law the special court shall have original and exclusive jurisdiction over any civil action — (1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of . . . this chapter . . .

Conrail points to a specific subparagraph in the complaint which charges the defendants with "depriving [the] plaintiffs of their seniority rights contrary to the provisions of . . . the Regional Rail Reorganization Act." Complaint, ¶XVIII(D).

The court agrees that this forum is not the proper place to inquire into the defendants' compliance with the provisions of the statutes which established the procedures for Conrail's operations. Such an inquiry would require an interpretation of these statutes, an analysis for which the Special Court has a unique competence. Cases in which such an inquiry is necessary are within the exclusive jurisdiction of the Special Court. *See, e.g., New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers,* 550 F. Supp. 1327, 1328 (Special Court, Regional Rail Reorganization Act 1982). Therefore, this court cannot and will not consider the question of whether the defendants complied with NRSA and the 3R Act.

The court notes that this issue is not central to this lawsuit. It has become clear that the plaintiffs do not complain about statutory violations of their seniority rights. Rather, their claim is that the defendants conspired with the intention and effect that, when Conrail acted according to statute, the *results* would be detrimental to the plaintiffs. Specifically, the complaint charges the defendants with conspiring to prevent the formation of a dovetailed seniority roster after the financial protections accorded displaced

rail workers were severely reduced in 1981. Thus, dismissal of the entire complaint is unwarranted.

Nor does the court believe that questions concerning the closure of former EL yards deprive this court of jurisdiction. This court is not being asked to enjoin Conrail from operating former Penn Central yards. Nor is the court asked to order the reopening of former EL yards. The court is, moreover, not being asked to decide whether Conrail had the authority to abandon the lines it closed or to keep open the ones it now maintains. This authority is conceded. Also not questioned is whether the defendants complied with the procedural requirements of the 3R Act and NRSA. These questions would clearly take this action outside of this court's subject matter jurisdiction, *see, e.g., Consolidated Rail Corp. v. County of Monroe,* 558 F. Supp. 1387, 1390 (Special Court, Regional Rail Reorganization Act 1983), but they are not raised here.

The issue as to whether the defendants conspired to close former EL yards does not require an interpretation of the statutes pursuant to which Conrail consolidated some lines and abandoned others. The issue raised in this complaint and on this motion is not complaince with statutes but whether the consolidation and abandonment decisions were based upon financial considerations or vindictiveness against the plaintiffs.

This case raises two basic questions: 1) Did BRC breach its duty of fair representation; and 2) Did TWU and Conrail conspire with BRC to that end. These questions do not make this a case which "has the potential for significantly affecting implementation of the Act." *Id.* The issues here are sufficiently tangential to NRSA so as not to deprive this court of subject matter jurisdiction.

V. Conspiracy Claims

Conrail argues that the absence of any proof of conspiracy and breach of duty of fair representation, plus the necessity of interpreting collective bargaining agreements, make this case a "minor dispute" within the primary jurisdiction of the National Railroad Adjustment Board. 45 U.S.C. §153 First (i); *O'Mara v. Erie Lackawanna Railroad Co.*, 407 F.2d 674 (2d Cir. 1969), *aff'd sub nom. Czosek v. O'Mara*, 397 U.S. 25 (1970). The defendants argue that plaintiffs have failed to raise the issue of conspiracy. Conrail points out that, absent evidence linking it with BRC's alleged breach of duty, Conrail must be dropped as a defendant in this lawsuit.

The court agrees that Conrail must be dropped if it is established that Conrail did not take part in any of the unions' misconduct. The court also agrees that the entire complaint must be dismissed if the plaintiffs fail to produce evidence sufficient to support an inference that the unions violated their rights.

The record at this point is very sparse. The only evidence which the plaintiffs have produced is the affidavit by Mr. Horsley. The court shares the defendants' view that neither the affidavit nor its many exhibits is sufficient to raise an inference that any of the defendants behaved improperly. In fact, the Horsley affidavit does more to exculpate Conrail than to condemn it. *See e.g.*, Item 23, Ex. C. There is also nothing to suggest any wrongdoing by TWU. *See, id.*, Ex. I, T. As previously noted, TWU was never the bargaining agent for these plaintiffs.

Normally, this state of affairs would compel granting of defendants' motions for summary judgment. The court's function here is to identify fact issues, not to resolve them, *PPX Enterprises v. Audiofidelity, Inc.*, 746 F.2d 120 (2d Cir. 1984), and the motion cannot be granted unless the facts and the reasonable inferences drawn from them raise no genuine issue of material fact.

Katz v. Goodyear Tire and Rubber Co., 737 F.2d 728 (2d Cir. 1984). This is a rigorous standard, but a party opposing the motion will not avoid dismissal if he fails to identify facts which support his claim. Fed.R.Civ.P. 56(e); *Dusanenko v. Maloney*, 726 F.2d 82 (2d Cir. 1984).

The Horsley affidavit is not sufficient to survive this motion, and the court would grant the motion were it not for the fact that it denied plaintiffs' request for further discovery, subject to renewal. *See*, order of November 22, 1983, Item 13. It would not be proper to dismiss the complaint for failure to develop evidence when there is some chance that this failure was not plaintiffs' fault.

The court notes that the charges here are very serious and that, on the present record, there is reason to believe that they are without foundation. The plaintiffs will need to show considerably more than they have shown thus far in order to survive a renewed motion for summary judgment.

VI. Conclusion

To summarize and repeat: 1) Such portions of the complaint that purport to hold the defendants liable for negotiating the 1975 prior rights agreement are dismissed as untimely; 2) The court will not consider the question of whether the applicable collective bargaining agreements violated seniority rights or any federal statue; 3) The motions to dismiss the claims against the defendants for failing to renegotiate the prior rights agreement are denied without prejudice.

The court shall hold a meeting with counsel on March 15, 1985, at 1:30 p.m. for the purpose of setting a schedule for limited discovery, after which the instant motions may be renewed.

So ordered.

s/ John T. Curtin

JOHN T. CURTIN
United States District Judge

Dated: March 4, 1985

FOOTNOTES

[1] The unclear complaint erroneously states that jurisdiction is based upon section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The case clearly arises under the Railway Labor Act.

[2] There is a logical problem to this view of the complaint. This arises from the fact that in 1975, no one could have known which railroad facilities would later be closed by Conrail. Prior rights existed for all workers, regardless of where they worked. Thus, if misfortune had later befallen Penn Central yards instead of EL yards, the prior rights agreement could only have helped these plaintiffs.

[3] A different result would be reached if the plaintiffs had waited more than six months before trying to convince their union to act on their request.

[4] Neither of the other two defendants makes this argument.